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Jaime Huling Delaye
450 Oak Grove Ave. #102
Menlo Park, CA 94025

Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Re: Comment on Proposed Regulation 18521.5 (Candidate Controlled Ballot Measure Committees)

To Whom It May Concern:

I am a third-year law student at Stanford Law School who has also had the opportunity to work as a paid campaign staffer fundraising for a California state candidate and to work for a law firm that specializes in preparing campaign finance and lobbying reports with the FPPC and other local and regional agencies that oversee elections in our state. Through these experiences, I have become familiar with the FPPC, its regulations, and the process through which many California political committees and major donors comply with disclosure requirements. This comment, however, reflects only my personal opinions and does not represent the views of any organization, coalition, or past client.

I agree with the Commission, that proposed regulations for Candidate Controlled Ballot Measure Committees are needed "to establish clear rules ensuring that contribution limits are observed" for such committees, to ensure that they are formed in relation to ballot measures that will be voted in "in the foreseeable future" and not used as a mechanism for giving candidates access to general purpose soft money funds, and "that funds contributed to support or oppose ballot measure campaigns are not diverted to campaigns for elective office." Notice to Proposed Regulation 18521.5 at 1. However, I feel that in order to effectively achieve these goals, and to avoid confusion among the Treasurers of Candidate Controlled Ballot Measure Committees, the proposed regulation should be expanded to specifically address the situations elaborated below.

The proposed regulation, subpart (e) says that "[c]ontributions to the committee are subject to the limit specified in Section 85303(b) if the committee makes a communication . . . that 'clearly identifies' a candidate as defined in Regulation 18531.10(a)(1)." This proposed regulation is ambiguous as currently drafted because the cross-referenced Section 85303(b) specifically establishes a contribution limit of \$25,000 per calendar year to "political party committees" and contributions "made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office." Cal. Code § 85303(b). I believe there will be confusion on a number of points unless Section 85303(b) is amended contemporaneously with proposed regulation 18521.5.

First, the commission should clarify in amended language to Section 85303(b) that the \$25,000 per calendar year contribution limit applies to candidate controlled ballot measure committees as well as “political party committees.” The commission should also clarify that the language in Section 85303(b) regarding “communications to party members” does not apply to and is not meant to affect the interpretation of the application of the proposed regulation. If this is not made clear, I anticipate that some committee treasurers will attempt to argue that the \$25,000 contribution limit is not applicable to communications to the general electorate, but only limits “communications to party members.”

Also, I would anticipate that some treasurers will also argue that their committees are only subject to the contribution limits of Section 85303(b) if the candidate controlled ballot measure committee makes a communication that is “related to the candidate’s candidacy for elective state office,” as described in Section 85303(b). The language of the proposed regulation seems to intend to apply to communications clearly identifying *any* candidate, but the cross-reference to Section 85303(b), seems to leave some room for an interpretation that the proposed contribution limits would only apply when a candidate controlled ballot measure committee made a communication referencing the candidate under whose control the committee is, or even that candidate’s specific reelection. The proposed regulation should clarify that section (e) limits apply when *any* candidate is referenced in *any* context, whether related to *any* candidate’s reelection or not.

This problem is exacerbated by the fact that it is unclear whether candidate controlled ballot measure committees would follow the Commission’s Manual 1 or Manual 3 as they prepared their Form 460 campaign disclosure reports. Manual 3, on pages 3-10 and 3-11 has language that further confuses the issue of when a communication identifies a candidate within the meaning of the proposed regulation and Section 85303(b). The manual seems to require that the communication is made at the “behest of the identified candidate,” for contribution limits to apply, implying that a communication identifying a candidate which is *not* made at that candidate’s behest (because it is an attack ad, for example) is not subject to contribution limitations. Manual 3 at 3-10. (And the contribution limit referenced in the manual differs from that referenced in the proposed regulation.)

An additional interpretative question that I anticipate arising is whether the required identification of the candidate controlled ballot measure committee as the sponsor of a communication constitutes a reference “clearly identifying” a candidate within the meaning of proposed regulation 18521.5(e), given that 18521.5(d) requires the candidate controlled ballot measure committee name itself, unlike other ballot measure committees, to contain the name of the controlling candidate.

One way to eliminate this complexity, and thereby limit the amount of the Commission’s resources that are spent clarifying this regulation for committees throughout the years, is to change proposed regulation 18521.5(e) to apply to all candidate controlled ballot measure committees, regardless of whether they make contributions identifying

candidates. Such a blanket policy would simplify the regulation, and would serve a valid public policy purpose of limiting state candidates' ability to control and direct unlimited soft money contributions from private donors. As we have seen with soft money contributions by private donors to state candidates' favorite charity causes, unlimited contributions made at the behest of candidates can have the power to buy access and influence even in situations where the candidates have no control over how that money is spent, and it cannot be spent to aid their own election or the electoral defeat of a political opponent. It would also greatly simplify the process of preparing campaign disclosure forms for candidate controlled ballot measure committees, allowing lesser-financed candidates who cannot afford to hire professional political treasurers to assist them with compliance to participate in the process without fear of inadvertently violating regulations.

As a separate matter, I would like to draw your attention to a possible loophole created by the proposed regulation. Subpart (f)(1) allows the funds to be spent on expenses including "committee administrative overhead." Candidates' own campaign committees' administrative overhead expenses may overlap with the administrative overhead expenses of their controlled ballot measure committees. Indeed, I fear that unless there are express limits on the extent to which these expenses are allowed to overlap, candidates will start to pay shared expenses such as rent, campaign staff, and campaign consulting costs disproportionately from their controlled ballot measure committees in order to take advantage of the higher contribution limitations. This would lead to situations where a candidate controlled ballot measure committee would exist primarily as a vehicle allowing large donors to pay shared candidate committee expenses and only nominally for their stated purpose of supporting or opposing an identified ballot measure. I would urge the commission to specify limitations on the funding of such joint expenses as a part of this initial regulation, preventing the creation of such a loophole.

If you have any questions regarding this comment, please feel free to contact me by mail at my address, above, via email at jhulingdelaye@stanford.edu, or by phone at 415 671-9841. Thank you for considering my thoughts regarding this proposed regulation.

Best,

A handwritten signature in cursive script that reads "Jaime Huling Delaye".

Jaime Huling Delaye